Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
APR 14 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Preemption of State and Local Zoning and	)	FCC ~~Docket No~~. 97-296
Land Use Restrictions on the Siting,	)	MM Docket No. 97-182 ✓
Placement and Construction of Broadcast	)	
Station Transmission Facilities	)	

To: The Commission

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS AND THE
ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television, Inc. ("MSTV"), by their attorneys, hereby file the following comments in response to the Commission's *Public Notice*, DA 98-458 ("*Notice*"), released March 6, 1998. The *Notice* seeks comments on the applicability of National Environmental Policy Act ("NEPA")[1] requirements in the above-captioned proceedings. The *Notice* was issued in response to a petition filed by the National Audubon Society ("Audubon") pursuant to 47 C.F.R. § 1.1307(c).

NAB is a non-profit, incorporated association of television and radio stations and broadcast networks that serves and represents the American broadcast industry. MSTV is a non-profit association of television station owners dedicated to preserving the technical integrity of

[1]42 U.S.C. §§ 4321 *et seq.*

the television broadcast service. NAB and MSTV jointly filed the Petition for Further Notice of Proposed Rule Making ("Petition") that led to the Commission issuing its *Notice of Proposed Rule Making* ("*NPRM*") in MM Docket No. 97-182 to consider adopting a rule circumscribing state and local zoning and land use authority concerning the siting, placement and construction of broadcast transmission facilities.

As the Commission recognizes, its ambitious policy of promoting a swift conversion to digital television ("DTV"), as well as its responsibility to foster the growth and improvement of broadcasting generally, may well conflict with an array of state and local regulations that could add severe procedural delays to the siting and modification of broadcast towers. Audubon's petition itself demonstrates that state and local environmental regulations are likely to add critical months, if not longer, to broadcasters' DTV conversion plans, further delaying and complicating an already difficult challenge.[2]

Despite Audubon's claims in its petition, the Commission need not prepare a special environmental impact statement ("EIS") to adopt a rule as contemplated in the *NPRM*. At least one commenter in the underlying proceeding has already argued that, before the Commission may adopt a preemption rule in this proceeding, it must prepare an EIS in accordance with NEPA, 42 U.S.C. § 4321 et seq.[3] Audubon's petition simply restates this argument.

NEPA, in fact, does require that the Commission, as an agency of the federal government,

---

[2]*See* Petition of National Audubon Society at 3 (stating, as illustrative of the time necessary for environmental review, that the U.S. Army Corps of Engineers takes, on average, 120 days merely to review an application for a project in wetlands and that the U.S. Fish and Wildlife Service takes up to 135 days to conduct a formal consultation and prepare a biological opinion where a threatened or endangered species may be affected). NAB and MSTV note that these periods reflect only the *beginning* of an environmental review process.

[3]*See* Comments of Concerned Communities and Organizations at 24-29.

prepare an EIS in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). It is well-settled, however, that the "initial determination concerning the need for an EIS lies with the agency." *City of Aurora v. Hunt*, 749 F.2d 1457, 1468 (10th Cir. 1984); *see also Image of Greater San Antonio, Tex. v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978). The agency's decision not to file an EIS may be reviewed by the courts for the reasonableness of its conclusion that the agency action will have no significant environmental consequences. *See Hunt*, 749 F.2d at 1468 (citing cases).

Audubon, as well as the previous commenter in this proceeding, overlooks that the Commission has, in fact, already made the determination of how its jurisdiction over broadcast towers intersects with the requirements of NEPA and has implemented rules to that effect. *See generally* Part 1, Subpart I of the Commission's Rules, 47 C.F.R. § 1.1301 et seq. (Procedures Implementing the National Environmental Policy Act of 1969).[4] These rules require, *inter alia*, that all radio broadcast services subject to Part 73 of the Commission's Rules be subject to routine environmental evaluation. Pursuant to this evaluation, those broadcast facilities that are to be located in wilderness areas, wildlife preserves or flood plains, or that may affect threatened or endangered species or critical habitats, or whose construction will involve significant change in surface features, are required to prepare an Environmental Assessment. *See* 47 C.F.R.

---

[4]The Commission has also conducted a series of rulemaking proceedings, in further compliance with NEPA, that considered the effects of radiofrequency radiation on the human environment. *See, e.g.*, In re Responsibility of the Federal Communications Commission to consider biological effects of radiofrequency radiation when authorizing the use of radiofrequency devices, *Report and Order*, 100 FCC 2d 543 (1985); *Second Report and Order*, 2 FCC Rcd 2064 (1987); *Third Report and Order*, 3 FCC Rcd 4236 (1988). *See also Second Memorandum Opinion and Order and Notice of Proposed Rule Making* in ET Docket No. 93-62 and WT Docket No. 97-192, released August 25, 1997.

§ 1.1307(a). Similarly, antenna towers to be located in residential areas that are to be equipped with high intensity white lights also require the preparation of an Environmental Assessment. *Id.* This Environmental Assessment must include a significant amount of information on the environmental aspects of facility construction or modification, including a "statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect." 47 C.F.R. § 1.1311 (a)(2).

The procedures the Commission has implemented already fully comply with NEPA. NEPA does not require the Commission to elevate environmental concerns above its other legitimate policy objectives. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (per curiam). The Commission's previous rulemaking proceedings already constitute the "hard look" at potential environmental consequences of broadcast facility construction that NEPA requires. *Baltimore Gas*, 462 U.S. at 97. Indeed, NEPA does not and cannot alter the structure of a federal agency's internal decision making, for agencies must be "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978) (internal quotation marks and citations omitted); *see also Baltimore Gas*, 462 U.S. at 100. The use of a generic method to evaluate the environmental effects of broadcast facility construction presents no barrier to compliance with NEPA's mandate. *See Baltimore Gas*, 462 U.S. at 101; *see also Vermont Yankee*, 435 U.S. at 535 n.13, 548. As the *Baltimore Gas* Court specifically stated with regard to generic determinations of environmental impacts:

> "Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event."

Baltimore Gas, 462 U.S. at 101.

The rule at issue in this proceeding does nothing to alter the procedures the Commission has already determined will best comport with NEPA; nor will the rule in any way change the potential environmental effects of broadcast facility construction. To suggest that the Commission needs to issue <u>another</u> EIS to adopt a rule which provides procedural and subject matter constraints on state and local decision making, or for any aggregate of broadcast facilities affected by the proposed rule, misstates the requirements of NEPA and would lead to needless administrative inefficiencies. NEPA was not intended "to give citizens a general opportunity to air their policy objections to proposed federal actions." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983).[5] The Commission already carefully considers the environmental impact of the construction or modification of broadcast facilities and

---

[5] The Supreme Court has specifically rebuked those who would use NEPA to obstruct the federal administrative process:

> "[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"

Vermont Yankee, 435 U.S. at 553-54. Audubon has not even engaged the Commission's own rules to see what the Commission already requires for compliance with NEPA.

neither that consideration nor the potential environmental impact of broadcast facility construction will be altered as a result of this proceeding.

Finally, the Commission can, in the context of this very rulemaking proceeding and the additional comments being filed in response to the *Notice*, determine that the proposed rule does not require an EIS, provided that there is compliance with the statutory minima of the Administrative Procedure Act. *See Baltimore Gas*, 462 U.S. at 104-05 (holding that a rulemaking determination that licensing boards should assume that the permanent storage of certain nuclear wastes would have no significant environmental impact complied with NEPA). This is especially true since an agency can be required to do no more than analyze "specific actions of known dimensions" under NEPA. *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976). In this proceeding, it is abundantly clear that the Commission cannot even speculate as to where new tower sites may be located, let alone whether they would have a significant effect on the human environment. Once tower sites are actually identified, the Commission's current regulations already provide for environmental evaluation that complies with NEPA, as discussed above.

CONCLUSION

For the reasons expressed herein, NAB and MSTV respectfully submit that the proposed rule under consideration in the *NPRM* does not have an independent significant environmental effect and, accordingly, that the Commission need not prepare an EIS in this proceeding.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Henry L. Baumann
Executive Vice President and
General Counsel

Barry D. Umansky
Deputy General Counsel

ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.
1776 Massachusetts Avenue, Inc.
Washington, D.C. 20036

Victor Tawil ROY

Victor Tawil
Senior Vice-President

Of Counsel:

Mark J. Prak
Marcus W. Trathen
David Kushner
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 1800
Raleigh, North Carolina 27602

April 14, 1998